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No. 90-348

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Supreme Court of the United States

OCTOBER TERM, 1990

NEW ERA PUBLICATIONS INTERNATIONAL, ApS,
Petitioner,

—v.—

CAROL PUBLISHING GROUP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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the copyrighted works, amounting to approximately 2.7% of the infringing work. Brief in Opposition at 2-3. The extent of the unauthorized taking therefore belies respondent's claim that it is not "substantial."[1]

In the alternative, respondent contends that this Court has indeed authorized "substantial" taking of published copyrighted material. Brief in Opposition at 6. Specifically, respondent relies on this Court's statement in *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 564 (1985), that "substantial quotations might qualify as fair use in a review of a published work. . . ." Brief in Opposition at 6. Petitioner has previously shown that this Court's suggestion in *Harper & Row* that substantial copying of a *review* "might" be permitted in certain circumstances is no authority for the substantial copying in respondent's *biography*. Petition at 15. Respondent nowhere responds to petitioner's argument. Petitioner submits that this Court's limited hypothetical suggestion regarding literary reviews should not be interpreted as a license for substantial taking from all published works. Certiorari should be granted because the court below has announced a new standard authorizing substantial takings of published works outside the narrow circumstances indicated in *Harper & Row*.[2]

2. Respondent fails to justify the refusal of the court below to consider in any meaningful way the amount of the takings in relation to the infringing work or in relation to each of the particular works from which they were taken.

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1 Respondent's position is also clearly contradicted by the case law. *See, e.g., Meerpol* v. *Nizer*, 560 F.2d 1061, 1070-71 (2d Cir. 1977), *cert. denied*, 434 U.S. 1031 (1978); *Craft* v. *Kobler*, 667 F.Supp. 120, 128-29 (S.D.N.Y. 1987).

2 Petitioner does not dispute here that there may be some difference in the amount of permissible copying from published and unpublished works. Petitioner submits, however, that the decision of the court below establishes a new standard for copying of published works, and thereby creates a wide gulf between permissible copying of published and unpublished works which is without precedent and is not authorized by any decision of this Court.

It is not disputed that the non-exclusive fair use factors authorize consideration of the amount and substantiality of the taking in relation to the copyrighted work. 17 U.S.C. § 107(3). But respondent and the court below refuse to acknowledge that this Court has authorized consideration of the amount of the taking in relation to the infringing work as an important method of assessing the third fair use factor. *Harper & Row*, 471 U.S. at 565-66. Analyzing the taking as a percentage of the infringing work is especially important where an overall substantial amount of copyrighted expression is taken from a number of works. Respondent's mere quotation of the court's citation to the statute, Brief in Opposition at 7-8, hardly justifies that court's refusal to undertake an analysis endorsed by this Court and adopted by the lower court, *see* cases cited in Petition at 17, which is critical to a proper assessment of the extensive taking in this case.

Respondent suggests that the court below did individually consider the amount of the taking from each of the copyrighted works. Brief in Opposition at 8. The fact that the court recited the groupings, provided by the parties, of the copyrighted works by percentages taken, 14a,[3] in no way shows that the court properly considered these facts in its analysis or reached a correct disposition. Despite the listing of percentages, the court merely concluded that "the book uses overall a small percentage of Hubbard's works." 14a. The court failed to give any significance to the fact that respondent copied high percentages of particular works. *See* JA 113-116. There is no authority permitting the copying of all or most of some copyrighted works merely because small percentages of longer works are also taken. Yet this is what the court below has done.

3. Respondent's discussion of the distinction between "factual" and "expressive" material mischaracterizes the position of the court below as well as that of petitioner. The impor-

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3 References to "____a" are to the Appendix to the Petition. References to "JA ____" are to the Joint Appendix filed in the court below.

tant point is that respondent cannot refute that the court below condoned the copying of expressive material, such as poetry, on the ground that a greater part of what respondent took was purportedly "factual" material. Respondent also fails to contradict petitioner's point that the court below erroneously held that philosophical and religious writings are factual.[4]

Respondent first suggests that the distinction between "factual" works and "creative" or "expressive" works is an improper one created by petitioner. Brief in Opposition at 8-9. In fact, it is a distinction drawn by the court below, see 13a, and is merely another way of articulating the distinction between "factual" and "non-factual" works, a distinction which respondent apparently accepts. Brief in Opposition at 8-9. After engaging the drawing of meaningless semantic distinctions, respondent finally acknowledges that courts permit greater use of factual as opposed to non-factual (read creative or expressive) material. Brief in Opposition at 10. Since respondent admits that non-factual material, like poetry, is entitled to greater protection, it cannot refute that petitioner has been injured by the decision of the court below (1) to treat philosophical and religious writings as "factual" and then (2) to overlook the taking of creative expression because "most" of the takings, including the takings of religious and philosophical writings, are allegedly factual. 13a.

As noted above, respondent never defends the decision of the court below regarding these two last points. Instead, it erroneously attributes to petitioner the argument that expressive material is "wholly beyond the fair use doctrine." Brief in Opposition at 10. Petitioner, of course, has not suggested that use of expressive material is never permitted. Rather, petitioner has argued that certiorari should be granted because the court below has (1) authorized the copying of expressive material if it is copied together with factual mate-

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4 Respondent is silent on this point, presumably because it would have difficulty defending a position which even caused the court below "some hesitation." 11a.

rial and (2) has designated religious and philosophical works as factual.

4. Regarding the market impact factor, respondent suggests that petitioner has overstated the position of the court below regarding the diminution of a copyrighted work's value once it has been published. Respondent claims the court merely held that published material does not have "the same" economic value as unpublished works. Brief in Opposition at 11. Respondent has grossly understated the sweep of the court's statement, as an objective review of the opinion will show. In the court's view, because the copyrighted works are published, the infringing "book will not tap *any* sources of economic profit that would otherwise go to the authorized biography." 19a (Emphasis added). This unequivocal language marks a clear, unwarranted change in the law.

Attempting to deflect attention from the court's unprecedented devaluation of published copyrighted works, respondent suggests that the court's market factor analysis rested principally on the position that it is "speculative" whether use of copyrighted material "in an unfavorable context" will discourage purchase of a forthcoming favorable biography. *See* 17a and Brief in Opposition at 11. This rationale provides no firmer footing for the court's opinion. The theory that the copying in an "unfavorable context" of copyrighted material results in no economic impact on the copyrighted work is simply a license for theft. Copyrighted works do not lose their protection because the infringer places what he has taken in a critical or unfavorable context.

The view adopted by the court is not "established precedent within the [Second] Circuit," as respondent asserts. Brief in Opposition at 11. The Second Circuit in *New Era Publications International, ApS* v. *Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989), reversed a district court finding on the fourth fair use factor in favor of the infringer which had been based in part on the same view. *See New Era Publications International, ApS* v. *Henry Holt & Co.*, 695 F.Supp. 1493, 1522-23 (S.D.N.Y. 1988). Given the unsettled status of

the case law regarding the questionable proposition that copying in an unfavorable context has no economic impact, respondent's contention that this proposition was critical to the court's decision provides all the more reason to grant the petition for certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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